(1) Supreme Court, U.S.

041256 MAR 16 2005

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

LESLIE E. WHITE,

PETITIONER

v.

UNITED STATES,

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
APPEALS COURT OF THE 6TH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Leslie E. White
913 Curdwood Blvd
Nashville, TN 37216
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QUESTIONS PRESENTED

This case was first filed in the District Court because of Collection Due Process Hearing (CDPH) held between the Petitioner and the IRS. After dismissing part of the case that had to do with the original tax, the District Court reduced the Petitioner's claims to the frivoluos return penalty. The Respondant asked for a Summary Judgment based on two claims: (1) Pentioner's 1997 income tax return is frivoluse on its face, and (2) the IRS did not abuse its discretion in assessing the tax. Both thise claims were based upon the figures of a W-2, Which gives rise to these questions:

1. Is the reliance on the figures shown on a Form W-2 too narrow of a standard of evidence to fulfill the requirements listed in 6702 for a frivolous penalty.
2. Can the District Court review the CDPH using 5 U.S.C. sec 706 as it applies to the frivolous return penalty as well as the abuse of discretion standard?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CETIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinions of the District Court appears at Appendix B and C.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 16, 2004. No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1245(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 CFR § 1.861-8	Appendix D
26 C.F.R. § 1.61-1(a).....	Appendix E
26 C.F.R. § 1.861-8T(d)(2)(iii).....	Appendix F
P.L. 105-206, § 3401(b)	Appendix G

STATEMENT OF THE CASE

I.

The reliance on the Form W-2 to decide whether the "gross income" is listed correctly on the Form 1040 is too narrow and incomplete in its evidence to fulfill the requirements of 26 U.S.C. § 6702, the frivolous return penalty. 26 U.S.C. § 6703(a) states, "In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary." This alone should allow the taxpayer to ask questions and get answer to how the penalty was determined. The instructions for the 2004 1040 form on page 19, column 3, has a heading that reads "Missing or incorrect Form W-2?" In the following paragraph it states "If you lose your Form W-2 or it is incorrect....." This is an indicator that the W-2 can be incorrect, therefore there should be colaberating evidence for the figures reported on the W-2. It is also established that everything that comes in can not be considered as "goss income." SOUTHERN PAC CO. v. LOWE , 247 U.S. 330 (1918), states, "We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act of 1909 (Doyle, Collector, v. Mitchell Brothers Co., 247 U.S. 179, 38 Sup. Ct. 467, 62 L. Ed. --, and Hays, Collector, v. Gauley Mountain Coal Co., 247 U.S. 189, 38 Sup. Ct. 470, 62 L. Ed. --, decided May 20, 1918), the broad content on submitted in behalf of the government that all receipts-everything that comes in-are income within the proper definition of the term 'gross income,' and that the entire proceeds of a conversion of capital assets, in whatever form and under whatever circumstances accomplished, should be treated as gross income." The definition for wages in 26 U.S.C. § 3401(a) list what is not to be included in the definition of wages. If any of these exceptions were

mistakenly included on the Form W-2 then the W-2 would be incorrect.

Furthermore since "gross income" is defined in 26 U.S.C. § 61 as "all income from whatever source derived," then the question of the wages reported on the W-2 is not whether they are "income" but if they are from a "source" included in "gross income?" In 26 U.S.C. § 861(a) we find that there are "items of gross income" that are treated as "income from sources." In 26 C.F.R. § 1.861-8(a)(1) states "Sections 861(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources within the United States after gross income from sources within the United States has been determined." Here is shown that "taxable income" must come from "gross income" and they both must come from "sources." What are these "sources?" 26 C.F.R. § 1.861-8(a)(1) explains further, "The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities under other sections of the Code, referred to in this section as operative sections. See paragraph (f)(1) of this section for a list and description of operative sections." So we see the sources are going to be called "operative sections" and can be found in (f)(1). So what does 26 C.F.R. § 1.861-8(f)(1) say:

> (f) Miscellaneous matters--(1) Operative sections. The operative sections of the Code which require the determination of taxable income of the taxpayer from specific sources or activities and which give rise to statutory groupings to which this section is applicable include the sections described below.
>
> (i) Overall limitation to the foreign tax credit. Under the overall limitation to the foreign tax credit, ...
>
> (ii) [Reserved]

(iii) DISC and FSC taxable income. Sections 925 and 994 provide
rules for determining the taxable income of a FSC and DISC .....
(iv) Effectively connected taxable income. Nonresident alien individuals and foreign corporations engaged in trade or business within the United States, under sections 871(b)(1) and 882(a)(1), on taxable income which is effectively connected with the conduct of a trade or business within the United States.....
(v) Foreign base company income. Section 954 defines the term ``foreign base company income" with respect to controlled foreign
corporations.....
(vi) Other operative sections. The rules provided in this section also apply in determining--
(A) The amount of foreign source items of tax preference under section 58(g) determined for purposes of the minimum tax;
(B) The amount of foreign mineral income under section 901(e);
(C) [Reserved]
(D) The amount of foreign oil and gas extraction income and the amount of foreign oil related income under section 907;
(E) The tax base for citizens entitled to the benefits of section 931 and the section 936 tax credit of a domestic corporation which has an election in effect under section 936;
(F) The exclusion for income from Puerto Rico for residents of Puerto Rico under section 933;

(G) The limitation under section 934 on the maximum reduction in income tax liability incurred to the Virgin Islands;
(H) The income derived from Guam by an individual who is subject to section 935;
(I) The special deduction granted to China Trade Act corporations under section 941;
(J) The amount of certain U.S. source income excluded from the subpart F income of a controlled foreign corporation under section 952(b);
(K) The amount of income from the insurance of U.S. risks under section 953(b)(5);
(L) The international boycott factor and the specifically attributable taxes and income under section 999; and
(M) The taxable income attributable to the operation of an agreement vessel under section 607 of the Merchant Marine Act of 1936, as amended, and the Capital Construction Fund Regulations thereunder (26 CFR, part 3). See 26 CFR 3.2(b)(3).

As can be seen the W-2 could be incorrect or does not apply to "gross income" if the "source" of the amount shown on the W-2 is not from the list. Furthermore it is noted that the list in 26 U.S.C. § 61 is also in 26 C.F.R. § 1.861-8(a)(3) and referred to as "items of gross income" to determine "classes of gross income."

This whole section, 26 C.F.R. § 1.861-8, is supposedly there to explain how to apply deductions to "gross income" to come up with "taxible income." In 26 C.F.R. § 1.861-8(e)(6) we find this, "Income taxes--(i) In general. The deduction for state, local, and foreign income,

war profits and excess profits taxes (``state income taxes") allowed by section 164 shall be considered definitely related and allocable to the gross income with respect to which such state income taxes are imposed. For example, if a domestic corporation is subject to state income taxation and the state income tax is imposed in part on an amount of foreign source income, then that part of the taxpayer's deduction for state income tax that is attributable to foreign source income is definitely related and allocable to foreign source income." As can be seen here, the state income tax deduction (26 U.S.C. § 164), can only be used if it has something to do with "foreign source income." The other examples in the same section follow suit. At first glance a person may think that 26 C.F.R. 1.861-8 deals only with that part of gross income that relates to foreign income, but the actual fact is that gross income relates only to the sources described in 26 C.F.R. 1.861-8.

It should be further noted that 26 C.F.R. § 1.61-1(a) states, "Gross income means all income from whatever source derived, unless excluded by law." This definition says "unless excluded by law" so obviously not every form of income is included in "gross income." So what income is included? 26 C.F.R. § 1.861-8T(d)(2)(iii) states:

> "Income that is not considered tax exempt. The following items are not considered to be exempt, eliminated, or excluded income and, thus, may have expenses, losses, or other deductions allocated and apportioned to them:
> (A) In the case of a foreign taxpayer...;
> (B) ...the gross income of a DISC or a FSC;
> (C) ...the gross income of a possessions corporation for which a credit is allowed

under section 936(a); and
(D) Foreign earned income as defined in
section 911 and the regulations thereunder..."

Here is a clever use of double negitives to say what is included. If something is not excluded then obviously it is included and the law applies to what is included not what is excluded. Since the definition of "wages" is different from the definition of "Gross income" and one is not necessarily included with the other, then to rely upon the Form W-2 for purposes of determining a frivolous return penalty is not soundly founded.

II.

The Collection Due Process Hearing is a relatively new law and was passed as P.L. 105-206, § 3401(b). Under "Reasons For Change" it states, "The Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor....The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers." The key words here are protection, fairness and due process. P.L. 105-206 also states, "The Tax Court is expected to review the appellate officer's determination for abuse of discretion and also may consider procedural issues, as under present law." The District Court already established that it can review the abuse of discretion as it applies to the frevolous return penalty but is ignoring the part of the law that allows "procedural issues, as under present law." It is obvious the Congress wanted to give the citizens relief from the abuse of the IRS, but this standard of review being adopted by the courts for a summary judgment thwarts this law and the due process provided by the Constitution.

Reasons for Granting the Petition

There are many United States citizens who are relying upon the law in their dealings with the IRS. P.L. 105-206 was written to help curb the abuse of the IRS, but the IRS is finding ways around this. Petitioner, who is not an attorney, has explained his position to the IRS relying upon the law as I have here. The answers from the IRS ignore the issues of law and procede forward without any regard to the law that is being relied upon. Usually the answers say the citizen is wrong without showing any law to back its position.

If this is a government for the people and of the people, and the IRS is supposed to be part of that government then the IRS should easily be able to provide the law that would satisfy the Petitioner and others who are relying upon the law for justice.

The Petitioner ask this Petition be granted, so this issue can be put to rest and the U.S. citizens can pay their fair portion without fear of wrongfull penalties.

Conclusion

It has always been a fundamental right for U.S. citizens to protect themselves from unfair and unlawful practices of government agentcies. The Supreme Court in *Federal Crop Insurance v. A. A. Merrill,* 332 U.S. 380, stating, "Anyone entering into any arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government, stays within the bounds of his authority." If a police officer wanted entrance to a home, it would be wise for the occupant to at least ask for I.D. and a warrant if the officer was going to search. This is common sense for most people.

In dealing with the IRS, the Petitioner has shown the government where he stands according to what the code says and according to the law. The replies by the IRS did not point out where in the code or law that the Petitioner was wrong, even though the IRS' mission is to help the taxpayer understand the law. In the CDPH the Petitioner tried to bring up the issue of proof of liability but the IRS officer did not show proof and tried to shut off that argument. The District Court ruled in favor of the government for summery judgement before the Petitioner's deadline to turn in the rebuttal. The Judge made another consideration but still ignored the proof of liablity claim and other due process claims. The Appeals Court upheld the District Court but said in its order that the claim the IRS violated the Administrative Prodecure Act "was not clearly raised in his complaint." Obviously as a Pro Se Litigant, it is difficult to raise all the issues appropriately, but this statement indicates that the District Court may have needed to allow the petitioner lenience to proceed, as is the law, so justice could be served.

It should be noted that the Petitioner is not crying foul because he doesn't like to be ruled against, but being ruled against without all the facts being heard and the claims being misrepresented. It would be easier to pay the mess then to deal with all this pressure. My motivation does not come easy.

During the era that the United States of America had its War of Independence, France had a revolution also. But there was a big difference between the two. While the U.S.A. imbraced God, France sought to rid herself of Him. They went as far as ten day work weeks so no one would know when the Sabbath would be. While the U.S.A.'s society improved, France's society declined into tyranny. One source said a person could be arrested for complaining in the bread line. This statement indicates many things.

France was becoming unproductive, thus the bread line. Obviously, no free speech and no justice. People were not being arrested for the purpose of justice but for the purpose of the state.

When we move away from what is just and what is right, then we move toward tryanny. History has proven this out (USSR, Nazi Germany, Rome). When we try to remove God from the realm of fact and into the realm of religion, then we move toward tryanny. When we think the needs of the "state" are greater then needs of what is just and Godly, we move toward tryanny and poverty. God is the Soul and Foundation of this country. He is the One that made us great before all nations. It can be seen in our history how He saved us from our enemies. It is within the Justice of God that we have mercy and grace.

The Plaintiff is not trying to improve the merits of his case by bringing up God, but is trying to show that justice and God can not be seperated. There is tyranny in the enforcement of this tax code. Everybody knows it but very few will say it. Cicero said that there are natural laws in nature and that man can only make laws that reflect these laws. He went on to say that if man's laws can decide justice, then man can make a law justify robbing another. Of course we know this is what is happening.

The fear for the government is the fear of collaspe without this tax money. But that is why we cannot forget about God. Which do we trust, the tyranny of taxes or the Justice of God.

It is easy for a country to sin as it is for a man to sin. This country has tried to cleanse itself of its sins, such as slavery, but now we have gotten ourselves into others sins, such as abortion. There are roots to those sins and as roots go there are many. This case is one of those roots, rather it looks large or small. When we restore the freedom to give to

our country and to our fellowman from our hearts then much will be restored to our moral fortitude.

If this case is just about a man who doesn't want to pay taxes then this case is worthless. But if the words are true, then only God can convince the heart to act. Justice for what is right is the only strong enough reason that the Plaintiff can muster.The Plaintiff has reasoned logically and morally. The is nothing else to do, but ask for the mercy and grace to hear my case.

The petition for a writ of certiorari should be granted.

Respectfully submitted

Leslie E. White

Leslie E. White

Date: 3/16/05

APPENDICES

APPENDIX A

No. 03-6010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESLIE E. WHITE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant-Respondent.	)	

[Filed Dec. 16, 1004, Leonard Green, Clerk. Not recommended for full-text publication. Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28 (g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.]

Before: GUY and COLE, Circuit Judges; TARNOW, District Judge.[1]

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[1] The Honorable Arthur j. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

Leslie E. White appeals pro se from a district court judgment dismissing a civil action that he had challenging the procedures used to assess his income tax liability and the imposition of a frivolous return penalty. His appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, the panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

White primarily alleged: 1) that the Internal Revenue Service ("IRS") failed to conduct an appropriate collection due process hearing under 26 U.S.C. §§ 6320 and 6330; and 2) that the IRS improperly imposed a $500 penalty against him under 26 U.S.C. § 6702, for filing a frivolous personal income tax return. The district court dismissed White's first claim for lack of jurisdiction on January 10, 2003. It awarded summary judgment to the government regarding his remaining claim on June 11, 2003, as that claim was based on the frivolous assertion that wages are not taxable income. The district court subsequently granted White's motion for reconsideration; however, it declined to reverse any of its prior rulings.

White alleges that the IRS violated its own procedures by failing to hold an appropriate hearing. The Sixth Circuit has held that "[t]he tax court has jurisdiction over income tax issues and liabilities...[t]hus, if the § 6330 proceeding involves income tax issues, the district court does not have jurisdiction to consider the case." *Diefenbaugh v. White*, No. 00-3344, 2000 WL 1679510, at *1 (6th Cir. Nov. 10, 2000); see also 26 U.S.C. § 6330(d)(1). The tax court also has jurisdiction over claims involving the procedural due process of a collection due process hearing. See, e.g. *Tornichio v. United States*, No. 5:02 CV 0351, 2002 WL 508325, at *3 (N.D. Ohio Mar. 18, 2002). Thus, the Court

properly dismissed the claim for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

White now argues that the IRS violated the Administrative Procedure Act by failing to provide him with the requested documents and information at his hearing. *See generally* 5 U.S.C. § 706. This claim was not clearly raised in his complaint, and we will not reach it for the first time on appeal. *See Barker v. Shalala*, 40 F.3d 789, 793-94 (6th Cir. 1994).

In his second claim, White challenged the government's imposition of a $500 penalty under 26 U.S.C. § 6702, for filing a frivolous tax return. The district court properly dismissed this claim because the deficiencies in White's income return were based on the frivolous assertion that wages are not taxable income. It is well-settled that wages are taxable income within the meaning of 26 U.S.C. § 61(a). *See Sisemore v. United States*, 797 F.2d 268, 271 (6th Cir. 1986); *Perkins v. Comm'r*, 746 F.2d 1187, 1188 (6th Cir. 1984). Since the pro se appellant has vigorously indicated his sincere intent to follow the law, he should be advised that, where the Supreme Court is silent on a matter, the decisions of the lower courts have the weight of law in their respective jurisdictions. Thus, the district court properly awarded summary judgment to the government on White's challenge to the penalty because his underlying assertion lacked an arguable basis in law.

The government now moves for a lump sum sanction in the amount of $6,000, arguing that White's appeal is frivolous and that $6,900 approximates the amount of expenses that it has incurred in similar appeals. *See generally* Fed. R. App. P. 38; *Schoffner v. Comm'r*, 812 F.2d 292, 293 (6th Cir. 1987). Claims based upon taxpayer's assertion that wages are not income and not taxable by the IRS have been consistently rejected by courts as frivolous

and sanctionable. *See, e.g., Perkins*, 746 F.2d at 1188-89. However, a recent decision from our court has indicated that $4,000 is a reasonable penalty for persisting in this type of frivolous appeal. *See, e.g., Sawukaytis v. Comm'r*, No. 02-2431, 2004 WL 1376612, at *5 (6th Cir. June 16, 2004).

Accordingly, the district court's judgment is affirmed and the government's motion for sanctions is granted in the amount of $4,000. Rule 34(j)(2)©, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LESLIE E. WHITE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:02-0417**
	)	**JUDGE ECHOLS**
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

Presently pending before the Court is Defendant's Motion for Summary Judgment (Docket Entry No. 21) to which nor response has been filed. For the reasons explained in the Memorandum entered contemporaneously herewith, Defendant's Motion is GRANTED and this action is DISMISSED WITH PREJUDICE. Plaintiff is hereby ordered to pay the frivolous return penalty of $500 assessed by the Internal Revenue Service. The Court finds that under the facts and circumstances of this case, Defendant is entitled to reasonable attorney fees and is granted leave to file an application for the fees pursuant to Local Rule 13 (e).

It is so ordered.

ROBERT L. ECHOLS

UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a). FRCP, on 6/12/03 by KM.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LESLIE E. WHITE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:02-0417**
	)	**JUDGE ECHOLS**
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM

Presently pending before the Court is Defendant's Motion for Summary Judgment (Docket Entry No. 21).

I.

Plaintiff Leslie E. White initiated this cause of action on April 25, 2002, against the United States under 26 U.S.C. § 63330(d)(1). Plaintiff allegedly owes taxes under 26 U.S.C. § 6330, and has been assessed a "frivolous return penalty" under 26 U.S.C. § 6702. Plaintiff contends that the Internal Revenue Service ("IRS") did not conduct a Collection Due Process Hearing in accordance with Sections 6320 and 6330, and Treasury Regulations 301.6320-IT and 301.6330-IT. Plaintiff additionally contends that the frivolous return penalty was unsupported by any evidence.

In his Complaint, Plaintiff seeks declaratory relief, reimbursement for costs, and punitive damages.

In an Order entered on January 10, 2003, the Court dismissed Plaintiff's claims under 26 U.S.C. § 6330 challenging the Collection Due Process Hearing (Docket Entry No. 16). Accordingly, the only remaining claim in this case is Plaintiff's claim that the frivolous return penalty under 26 U.S.C. § 6702 was unsupported by any evidence. Defendant now moves for summary judgment on that claim.

II. FACTS

Plaintiff failed to respond to Defendant's Statement of Undisputed Facts (Docket Entry No. 25). Therefore, pursuant to Local Rule 8(b)(7)(g) the facts asserted by Defendant are not disputed for the purpose of Summary Judgment. On or about April 15, 1998, Plaintiff filed his 1997 federal income tax return (Docket Entry No. 21, Ex. 1). Plaintiff filled in $0.00 for his wages, salaries and tips. Pages 3 and 4 of Plaintiff's 1997 tax return consist of a thirteen paragraph statement, including out-of-context citations to cases, Internal Revenue Code provisions, and Regulations, of why Plaintiff believes he does not owe any income taxes for 1997. Plaintiff's primary argument is that the wages listed on his W-2 form do not constitute "income." Plaintiff's W-2 form shows that he earned $11,610 in wages during 1997 (Docket Entry No. 21, Ex. 2), which was not reported on Plaintiff's income tax return.

On June 8, 1999, the IRS mailed Plaintiff a letter informing him that his 1997 income tax return was frivolous and that his position had no basis in law. (Docket Entry No. 21, Ex. 3). The letter stated that he would be subject to the $500 frivolous return penalty, pursuant to 26 U.S.C. § 6702, if he did not correct his postion and send a corrected return within 30 days. (Id.) On June 21, 1999, kplaintiff responded to the IRS's letter, appealing the notice of intent to assess

plaintiff with the frivolous return penalty. (Docket Entry No. 21, Ex. 4). The Letter included six pages of further arguments supporting his position that wages in general do not constitute income, and therefore he was entitled to file a $0.00 income tax return. Plaintiff never filed and amended return, and his appeal of the frivolous return penalty was denied. On September 13, 1999, the IRS assessed the $500 frivolous return penalty against Plaintiff. (Docket Entry No. 21, Ex. C).

Plaintiff was issued a Final Notice of Intent to Levy from the IRS on June 23, 2001, which proposed a levy to collect the $500 owed for the frivolous return penalty. Plaintiff filed a request for a Collection Due Process Hearing, pursuant to 26 U.S.C. § 6330(b), on July 19, 2001. Mr. Scott Biggs, a Settlement Officer with the Office of Appeals of the IRS, was assigned to conduct the hearing. Prior to the Collection Due Process Hearing, plaintiff informed Biggs that Plaintiff questioned the validity of the Notice of Deficiency and the frivolous return penalty. Among other things, Plaintiff requested documentation of the frivolous return penalty.

The Collection Due Process Hearing took place on March 14, 2002. At the Hearing, Mr. Biggs did not provide any of the specific documentation requested by Plaintiff. With regard to the frivolous return penalty, Biggs was unable to in form Plaintiff which individual person imposed the frivolous return penalty, and whether that person was authorized to impose such penalties. At the hearing, Plaintiff refused to discuss any collection alternatives with Biggs, who informed Plaintiff and verified that all statutory, regulatory, and administrative requirements were met before the Notice of Intent to Levy was issued. Plaintiff was provided with a copy of Form 4340, Certificate of Assessments and Payments, which showed the date and amount of the

frivolous return penalty assessment. He challenged the underlying liability for the frivolous return penalty by making frivolous "constitutional" arguments commonly made by individuals who deny the government's authority to collect income taxes.

Plaintiff submitted a copy of the transcript of the Collection Due Process hearing (Docket Entry No. 1, Ex. E). A sample of the dialogue is as follows:

> Mr. Biggs: What's your objection to the civil penalty?
>
> Mr. White: Look it up. I can't understand why you can't answer my questions. I thought that's what this hearing was about. Especially since my rights at the beginning have been, of due process, have just been run over run through this whole process.
>
> Mr. Biggs: Do you have any issues regarding the civil penalty?
>
> Mr. White: Yes, I do. I've got to look at my notes. So do you have that master file with you that you've been working from? You do not have the master file.
>
> Mr. Biggs: The master file is that transcript.
>
> Mr. White: It doesn't have 1040 in it. I don't understand.
>
> Mr. Biggs: This is your last opportunity to tell me what your objection is to the civil penalty.
>
> Mr. white: I'm looking for my notes. Be patience [sic] a minute here. Well first of all, I don't have a civil penalty because I don't have no [sic] tax liability and haven't shown me that. Because I don't have a 1040. If you want to obtain a 1040 and show it to me later, I think maybe this meeting has ... maybe we need to

reschedule the meeting. Because I need to be shown that I have tax liability and I haven't been shown that according to the IRS Code. So without liability there can't be a penalty.

Mr. Biggs: I find your objection unfounded and deem the liability correct. Do you want to discuss any collection alternatives?

Mr. White: Incorrect under what law and what regulation.

Mr. Biggs: IRC 6702.

. . . .

Mr. Biggs: You filed a 1040?

Mr. White: Yes, I did and it says zero. All you got to show me is the 1040 that changes it.

Mr. Biggs: That's a frivolous argument then, that we won't discuss.

On March 28, 2002, following the Collection Due Process Hearing, the IRS mailed Plaintiff a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330. The attachment to the Notice of Determination states that the IRS deems the levy action under Section 6330, including levy for the frivolous return penalty, appropriate.

III. STANDARD OF REVIEW

In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. See *Anderson b. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56

have been met. See *Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact that is disputed. See *Anderson*, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

To defeat a properly supported motion for summary judgment, an adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). The nonmoving party's burden of providing specific facts demonstrating that there remains a genuine issue for trial is triggered once the moving party "show[s} – that is, point[s] out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

IV. ANALYSIS

Defendant Contends that Summary Judgment should be granted on the remaining claim, Plaintiff's frivolous return penalty, because there is no question of fact that (1) Plaintiff's 1997 income tax return is frivolous on its face, and (2) the IRS did not abuse its discretion in assessing the tax.

A. *Plaintiff's 1997 Income Tax Return is Frivolous on its Face*

The frivolous return penalty was assessed pursuant to 26 U.S.C. § 6702, which states:

> (a) Civil penalty. – If –
>
> (1) any individual files what purports to be a return of the tax imposed by subtitle A but which –
>
> (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicateds that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to—

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

The recent case of *Gillet v. U.S.*, 233 F. Supp.2d 874 (W.E. Mich. 2002), in the Western District of Michigan is instructive. In *Gillet*, Plaintiff entered zeros on his 1998 and 1999 tax returns, despite the fact that his W-2 forms showed the payment of wages, tips, or other compensation. *Id.* At 878. He was assessed a frivolous return penalty for his 1999 tax return. The court stated that:

> [t]he test for frivolousness under section 6702(a) is an objective one, and is met when the position taken by the individual has no basis in fact or law. Numerous federal courts have upheld the imposition of the $500 sanction by the IRS pursuant to where, as here, a tax form is filed stating that an individual had no income, but the attached W-2 forms show wages, tips, or other compensation of greater than zero.

Id. At 881 (citations omitted).

Other cases in this district clearly support the conclusion that Plaintiff's position has no basis in law, because wages are income. The court in *Hill v. U.S.* noted that with regard to the fact that wages are income, "any contention to the contrary is patently frivolous." 599 F. Supp. 118, 121 (M.D. Tenn. 1984). The court further held in *Beckelhimer v. U.S.* that:

> Any document which purports to be a federal income-tax return (or an amended return) and which attempts to reduce one's tax-liability by excluding wages or salary from taxable –income, on the ground that they do not constitute taxable-income, on the ground that they do not constitute taxable-income, is frivolous within the meaning of 26 U.S.C. § 6702(a); and that where one has filed such a document with the IRS, the assessment of the $500 civil-penalty mandated by § 6702(a) is proper.

623 F. Supp. 115, 116 (M.D. Tenn. 1985). In a recent case, *Stanco v. U.S.*, 1999 WL 907510 at *3, 84 A.F.T.R.2d 99-6243 (M.D. Tenn. 1999), the plaintiff entered zero for income and asserted that wages are not income for income tax purposes. The court stated that "it is well settled law that wages are includable in gross income." *Id.* In that case, the court held that "[g]iven that the plaintiffs' sole justification on their 1997 tax return for their refund claim is that Joseph Stanco's wages are not includable in his gross income, the Magistrate judge concludes that this return is frivolous as a matter of law." *Id.* at *3, 84 A.F.T.R.2d 99-6243. There is no case holding to the contrary. The Court therefore finds that Plaintiff's wages are income, should have been reported as such on his income tax return, and the failure to do so caused his tax return to be frivolous.

B. *IRS Did Not Abuse Its Discretion*

Defendant also asserts that the IRS did not abuse its discretion in rejecting Plaintiff's position. The Sixth Circuit has not yer adopted a standard of review for administrative decisions in the IRS penalty context. However, several district courts "within this circuit have adopted the abuse of discretion standard in IRS cases...." *Carroll v. U.S.*, 217 F. Supp.2d 852, 856 (W.D. Tenn. 2002); see *Bonfante v. U.S.*, 2002 WL 373407, 89 A.F.T.R.2d 2002-1109 (S.D. Ohio

2002); *Gellar v. U.S.*, 2001 WL 1346669, 88 A.F.T.R.2d 2001-6494 (S.D. Ohio 2001). As stated by the Western District of Tennessee, the abuse of discretion review of "a determination will be affirmed unless the court determines with a 'definite and firm conviction' that a clear error of judgment has been committed." *Carroll*, 217 F. Supp.2d at 856 (quoting *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998)).

Because the validity of the underlying tax is not at issue before the Court , the only question is whether the IRS abused its discretion in imposing and upholding the frivolous return penalty. Plaintiff did not respond to Defendant's Motion, but asserted in the Complaint that Biggs did not provide the hearing in accordance with the law. The Collection Due Process hearing is governed by 26 U.S.C. § 6330, which provides in pertinent part:

> (b) Matters considered at hearing.—In the case of any hearing conducted under this section—
>
> (1) Requirement of investigation.—The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of an applicable law or administrative procedure have been met.
>
> (2) Issues at hearing.—
>
> (A) In general.—The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—
>
> (i) appropriate spousal defenses;
>
> (ii) challenges to the appropriateness of collection actons;and
>
> (iii)offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an

installment agreement, or an offer-in-compromise.

(B) Underlying liability.—The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination.—The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2);and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

It is evident from the transcript submitted by Plaintiff that Biggs asked him several times for a valid argument as to why he should not be assessed a frivolous return penalty. Plaintiff simply continued to repeat that he did not owe any income tax and that he should be shouwn documentation that he owed income tax based on his wages. Biggs also asked Plaintiff several times to discuss collection alternatives, which Plaintiff would not do. Plaintiff did not raise any non-frivolous challenges to the appropriateness of the collection action, and he did not dispute that he received notice of the assessment of the frivolous return penalty.

As required by 26 U.S.C. § 6330(b)(3), the hearing was conducted by Biggs, an impartial officer who had nothing to do with Plaintiff's case prior to the Collection Due Process Hearing. Biggs verified that the IRS complied with all statutory, regulatory, and administrative requirements.. (Docket Entry No. 21, Ex. 5, § 7). Plaintiff was provided a copy of Form 4030, Certificate of Assessments and Payments, showing the date and amount of the frivolous return penalty assessment. The basis for Biggs' determination that the frivolous return penalty should be assessed was clear, and it should bhave been clear to Plaintiff. Rather than provide any basis for his allegation that Biggs abused his discretion, Plaintiff continues to assert the same frivolous claims in his Complaint. His primary argument rests on the notion that Biggs did not provide any documentation at the Collection Due Process Hearing that he owes any taxes. There were no arguments raised at the Collection Due Process Hearing with regard to the frivolous return penalty, other than the fact that plaintiff believes that because he was entitled to enter $0.00 for income on his tax return, that he cannot be assessed a frivolous return penalty.

The Court has determined, as have all Courts considering this issue, that wages are income. Therefore, the Court finds that no clear error of judgment was committed. Finding the return to be frivolous, and that no abuse of discretion occurred at the Collection Due Process Hearing where Plaintiff had the ability to dispute the assessment of the frivolous return penalty, ther is no genuine issue of fact, and Defendant's Motion for Summary Judgment shall be GRANTED.

VI. ATTORNEY FEES

In its Memorandum, Defendant asserts that attorney fees and cost should be assessed against Plaintiff. As in *Carroll, supra*, the Court finds that based upon the frivolous

and spurious nature of Plaintiff's arguments, Plaintiff maintained this action in bad faith. Thus, the United States is entitled to recover a reasonable attorney's fee and related expenses under 28 U.S.C. § 2412(a). the Sixth Circuit has cautioned that "[l]itigants are warned that in future cases in which the lower court has clearly explained, as it has here, the frivolous nature of the taxpayer's claim that earned income is not taxable, we will not hesitate to award actual attorney fees to the Commissioner ...." Perkins v. C.I.R., 746 F.2d 1187, 1188-89 (6th Cir. 1984). Even taking into account the fact that Plaintiff proceeded pro se, it is well settled that "litigants who might persist in claiming that wages or salary are not taxable-income that they risk being assessed with a reasonable attorney's fee in favor of the United States because 'it is highly unlikely that any similar lawsuit could be maintained in anything other than bad faith.'" *Beckelhimer*, 623 F. Supp. At 116 (quoting *Hill*, 599 F.Supp. at 122)(assessing reasonable attorney's fees and costs to a pro se plaintiff). Accordingly, the Court finds that Defendant is entitles to reasonable attorney fees.

VII. CONCLUSION

For the reasons stated herein, Defendant's Motion for Summary Judgment 9Docket entry No. 21) will be GRANTED, and Defendant will be granted leave to file an application for attorney fees in accordance with Rule 13(e), Local Rules of Court.

An appropriate Order will be entered.

s/ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LESLIE E. WHITE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:02-0417**
	)	**JUDGE ECHOLS**
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

Presently pending before the Court are (1) plaintiff's Motion to have Judge Immune to Federal Income Tax Prosecution (Docket Entry No. 36) and (2) Plaintiff's Motion to Reconsider on Defendant's Motion to Reconsider on Defendant's Motion for Summary Judgment (Docket Entry No. 37), to which no response has been filed.

Plaintiff is proceeding pro se. In its Memorandum and Order of June 12, 2003, the Court granted Defendant's Motion for Summary Judgment and dismissed this action with prejudice. (Docket Entry Nos. 32, 33). Plaintiff alleges the government has undue influence over the undersigned Judge through the nation's taxing authority. In order to relieve this pressure and in view of the Court's pervious adverse ruling against Plaintiff, Plaintiff now seeks to have

the undersigned immune from prosecution by the Internal Revenue Service. Further, Plaintiff asks the Court to reconsider its earlier summary judgment decision, contending that (1) he was not given the time allowed by the Magistrate Judge to respond to the Motion for Summary Judgment, and (2) the Court's Order dismissing this action indicates that the Court is prejudiced against the Plaintiff.

I. MOTION TO HAVE JUDGE IMMUNE TO INCOME TAX PROSECUTION

Plaintiff asserts in his Motion that federal judges are taxed in the same manner as other taxpayers and are subject to income tax prosecution. In order to alleviate this perceived pressure and undue influence, Plaintiff moves to have the undersigned be immune from federal prosecution for income tax violations for the next ten years. Plaintiff provides no facts or law to support his allegation that federal judges in general, or the undersigned in particular, are under undue pressure because they have to pay income tax on their income and are subject to federal prosecution if they do not do so or how a federal judge could declare himself immune from federal prosecution. This theory is bizarre, without foundation or support, and meritless. Accordingly, Plaintiff's Motion is hereby DENIED.

II. MOTION TO RECONSIDER

Plaintiff does not state under which Federal Rule of Civil Procedure he intends to proceed. However, as Plaintiff requests that the Court alter its previous judgment in this case, his Motion to Reconsider the Court's granting of Defendant's Motion for Summary Judgment is more properly considered a Motion to Alter or Amend a Judgment pursuant to Fed. Rule Civ. Pro. 59(e). A court may alter or amend its judgment for one of three reasons: (1) because of an intervening change of controlling law; (2) because evidence not previously available has become available; or (3) because

such action is necessary to correct a clear error of law or prevent manifest injustice. *See Gencorp., Inc. v. Am. Int'l Underwriters*, 178 f.3d 804, 834 (6th Cir. 1999).

Plaintiff appears to proceed on the theory that the Court's June 12, 2003, ruling would be manifestly unjust to Plaintiff because it was entered before the Court received Plaintiff's timely pleadings in response to the Motion for Summary Judgment. Although a plaintiff is normally given 20 days to respond to a motion for summary judgment, the Magistrate Judge in this case ordered Plaintiff to file a response to Defendant's Motion for Summary Judgment by June 13, 2003. (Docket Entry No. 20). On this deadline date, Plaintiff filed his Answer to Government's Statement of Undisputed Facts (Docket Entry No. 35), a Summary of Evidentiary Disputes (Docket Entry No. 40), and a Summary of Legal Theories (Docket Entry No. 42) which the Court construes as Plaintiff's response to Defendant's Motion for Summary Judgment. Therefore, Plaintiff's "Motion to Reconsider," construed as a motion to alter or amend its prior Order, is hereby GRANTED, and the Court will consider Plaintiff's pleading as timely filed.

The Court's original Order granting Defendant's Motion for Summary Judgment held that (1) Plaintiff's 1997 income tax return is frivolous on its face eithin the meaning of 26 U.S.C. § 6702, and (2) the I.R.S. did not abuse its discretion in determining that Plaintiff's 1997 income tax return was frivolous. Having again reviewed Plaintiff's filings in this case, the Court finds that there is no remaining issue of material fact that would save Plaintiff's frivolous return penalty claim from summary judgment. Plaintiff continues to assert that his return was not frivolous because "[w]ages are not listed under the definition of gross income in IRC 61." The Court's Memorandum (Docket Entry No. 32) addresses this issue in detail and explains why Plaintiff's

position is incorrect as a matter of law. Further, the issues now raised by Plaintiff in his Motion do not change the Court's original finding that the I.R.S. did not abuse its discretion is assessing a frivolous return penalty against Plaintiff. Plaintiff raises no other issues that the Court has not previously considered.

III. CONCLUSION

Accordingly, for the reasons explained herein, plaintiff's Motion to have Judge Immune to Federal Income Tax Prosecution (Docket Entry No. 36) is hereby DENIED, and Plaintiff's Motion to Reconsider on Defendant's Motion for Summary Judgment (Docket Entry No. 37) is hereby GRANTED. Having reviewed the Motion to Reconsider, the Court hereby DENIES Plaintiff's request to reverse the Court's previous ruling on Defendant's Motion for Summary Judgment (Docket Entry Nos. 32, 33).

It is so Ordered.

s/ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a). FRCP, on 1/29/04 by KM.

APPENDIX D

26 C.F.R.

Sec. 1.**861-8** Computation of taxable income from sources within the United States and from other sources and activities.

(a) In general--(1) Scope. Sections **861**(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources within the United States after gross income from sources within the United States has been determined. Sections 862(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources without the United States after gross income from sources without the United States has been determined. This section provides specific guidance for applying the cited Code sections by prescribing rules for the allocation and apportionment of expenses, losses, and other deductions (referred to collectively in this section as ``deductions") of the taxpayer. The rules contained in this section apply in determining taxable income of the taxpayer from specific sources and activities under other sections of the Code, referred to in this section as operative sections. See paragraph (f)(1) of this section for a list and description of operative sections. The operative sections include, among others, sections 871(b) and 882 (relating to taxable income of a nonresident alien individual or a foreign corporation which is effectively connected with the conduct of a trade or business in the United States), section 904(a)(1) (as in effect before enactment of the Tax Reform Act of 1976, relating to taxable income from sources within specific foreign countries), and section 904(a)(2) (as in effect before enactment of the Tax Reform Act of 1976, or section 904(a) after such enactment, relating to taxable income from all sources without the United States)....

(3) Class of gross income. For purposes of this section, the gross income to which a specific deduction is definitely related is referred to as a ``class of gross income'' and may consist of one or more items (or subdivisions of these items) of gross income enumerated in section 61, namely:

(i) Compensation for services, including fees, commissions, and
similar items;

(ii) Gross income derived from business;

(iii) Gains derived from dealings in property;

(iv) Interest;

(v) Rents;

(vi) Royalties;

(vii) Dividends;

(viii) Alimony and separate maintenance payments;

(ix) Annuities;

(x) Income from life insurance and endowment contracts;

(xi) Pensions;

(xii) Income from discharge of indebtedness;

(xiii) Distributive share of partnership gross income;

(xiv) Income in respect of a decedent;

(xv) Income from an interest in an estate or trust.....

(f) Miscellaneous matters--(1) Operative sections. The operative sections of the Code which require the determination of taxable income of the taxpayer from specific sources or activities and which give rise to statutory groupings to which this section is applicable include the sections described below.

APPENDIX E

26 C.F.R. § 1.61-1

a) General definition. Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, Sec. 1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

APPENDIX F

26 C.F.R § 1.861-8T (d)(2)

(iii) Income that is not considered tax exempt. The following items are not considered to be exempt, eliminated, or excluded income and, thus, may have expenses, losses, or other deductions allocated and apportioned to them:

(A) In the case of a foreign taxpayer (including a foreign sales corporation (FSC)) computing its effectively connected income, gross income (whether domestic or foreign source) which is not effectively connected to the conduct of a United States trade or business;

(B) In computing the combined taxable income of a DISC or FSC and its related supplier, the gross income of a DISC or a FSC;

(C) For all purposes under subchapter N of the Code, including the computation of combined taxable income of a possessions corporation and its affiliates under section 936(h), the gross income of a possessions corporation for which a credit is allowed under section 936(a); and

(D) Foreign earned income as defined in section 911 and the regulations thereunder (however, the rules of Sec. 1.911-6 do not require the allocation and apportionment of certain deductions, including home mortgage interest, to foreign earned income for purposes of determining the deductions disallowed under section 911(d)(6)).

APPENDIX G

P.L. 105-206, § 3401(b)

REASONS FOR CHANGE

The Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor.

Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property. When collection of tax is in jeopardy, the Committee believes it is appropriate to provide notice and a hearing promptly after the deprivation of property. The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers. ……..

The taxpayer may contest the determination of the appellate officer in Tax Court by filing a petition within 30 days of the date of the determination. The Tax Court is expected to review the appellate officer's determination for abuse of discretion and also may consider procedural issues, as under present law. The IRS may not take any collection action pursuant to the determination during such 30 day period or while the taxpayer's contest is pending in Tax Court. …….